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In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANCISCO C. PELAES, PETITIONER

v.

UNITED STATES OF AMERICA

ENRIQUE JESUS OSORNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the admission into evidence of a statement made by petitioner Pelaes to a co-conspirator while Pelaes was in custody awaiting trial violated their Sixth Amendment right to counsel.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of kidnapping and conspiracy to kidnap, in violation of 18 U.S.C. 1201(a)(1) and (c). Petitioner Pelaes was sentenced to concurrent terms of 18 years' imprisonment. Petitioner Osorno was sentenced to concurrent terms

of 12 years' imprisonment. The court of appeals affirmed (Pet. App. 1a-14a).[1]

a. The evidence at trial established that petitioner Pelaes and several others kidnapped an 11-year-old boy and held him hostage for three weeks. The kidnappers demanded as ransom the return of seven kilograms of cocaine that they believed had been stolen from one of them by the boy's uncle (Pet. App. 3a-4a). Petitioner Osorno joined the conspiracy after the boy had been seized, and he thereafter played a major role in negotiating the return of the cocaine in exchange for the boy (*id.* at 13a-14a).

The kidnapping incident stemmed from a transaction in which petitioner Osorno sold 10 kilograms of cocaine on consignment to one Ramon Antonio Serrano. Serrano hired Freddy Almeida to transport the cocaine from Miami to Los Angeles. About two weeks after he received the cocaine, Serrano discovered that some of it was missing, and he asked Freddy for help in hiding the remaining seven kilograms. Freddy took Serrano to his father-in-law, Victor Jimenez, who agreed to store the cocaine in his attic. Thereafter, local police seized the cocaine and Jimenez disappeared. Serrano did not believe Freddy's report that the cocaine had been seized by the police, and he attempted to find Jimenez. Serrano threatened both Freddy and his wife in the course of his efforts to locate the missing cocaine. Meanwhile, Osorno was looking for Serrano, who had not yet paid for the cocaine. Pet. App. 4a, 10a-11a; Tr. 23-30, 39-40, 92-105, 109-111, 126-127.[2]

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-59.

[2]Citations to the trial transcript are taken from the government's brief in the court of appeals.

Serrano then traveled to Miami, where he enlisted the aid of petitioner Pelaes and four others, including Angel Lastre-Parrada. All six flew back to Los Angeles, where they made preparations to kidnap Freddy's nephew, 11-year-old Luis Almeida. Early in the morning of November 25, 1983, petitioner Pelaes, along with Lastre-Parrada and two others, grabbed Luis as he left his home. Pelaes held a gun to the boy's head, and the men put Luis in the back of a van, blindfolded him, and drove him to a house that Serrano had rented. Pet. App. 3a, 12a; Tr. 254, 322-334, 341-342, 345, 373, 439, 463-465, 468-469.

During extended negotiations for the return of Luis, petitioner Pelaes and others spoke several times by telephone with Luis's father, Carlos Almeida, threatening to kill Luis and demanding money and jewelry in addition to the seven kilograms of cocaine (GX 20J).[3] After Carlos told Pelaes that he had the drugs, Pelaes directed him to travel to the east coast to make the exchange (GX 20L). Petitioner Osorno also joined the conspiracy, first posing as a go-between for Carlos, but later directing the final details of the planned exchange in New York (GXs 20E, 20H, 20I, 20-O, and 20P). While the kidnappers were making a final telephone call to Carlos from a telephone booth in New York City, law enforcement agents rescued Luis and arrested the kidnappers (Tr. 455; Pet. App. 12a-14a).

b. After Lastre-Parrada pleaded guilty to the kidnapping and conspiracy charges and was sentenced on those charges, he sought to convey to his attorney that he was willing to testify for the government at the retrial of his

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[3]On November 28, 1983, the Federal Bureau of Investigation equipped the Almeidas' telephone with a recording device. Fifteen calls relating to Luis were recorded between November 29 and December 16, 1983 (GXs 20A-20P).

co-defendants (Pet. App. 7a).[4] Several weeks later, Lastre-Parrada was transferred to the Metropolitan Correctional Center (MCC) in New York City in order for prosecutors to discuss with him the possibility of his cooperation (*id.* at 8a). Before his return, the Assistant United States Attorney (AUSA) in charge of the case telephoned the MCC and told officials there that Lastre-Parrada would be arriving and should not be housed in proximity to the co-defendants who were awaiting trial. The AUSA thereafter wrote a letter to the MCC reiterating his instructions, and he then telephoned again to make sure his directions were understood. The AUSA was assured that MCC officials understood that Lastre-Parrada should be segregated. *Ibid.*

Notwithstanding the efforts of the AUSA, Lastre-Parrada was placed on the same floor of the MCC on which petitioner Pelaes and another co-defendant were housed. Thereafter, Pelaes and two others approached Lastre-Parrada and asked him to testify falsely if he was called as a witness at the upcoming retrial; specifically, they urged him to support Pelaes's contention that Carlos Almeida had consented to the taking of Luis as security for the return of the cocaine (Pet. App. 5a-6a). That conversation occurred before Lastre-Parrada had met with either his own lawyer or the AUSA (Tr. 292, 308).

c. Lastre-Parrada testified at trial about the details of the kidnapping and the roles played by both petitioners. In addition, he testified that Pelaes had asked him to testify falsely in support of Pelaes's defense theory (Pet. App. 4a).

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[4]Petitioners and others earlier had been tried and convicted on the same charges, but their convictions were reversed on appeal. See *United States* v. *Pedroza*, 750 F.2d 187 (2d Cir. 1984). At Lastre-Parrada's sentencing, the prosecutor had told Lastre-Parrada's attorney that the government would be interested in his cooperation at the retrial of the others (Tr. 304-307; Aff. of AUSA Paul Summit at 1).

The district court held a brief evidentiary hearing before admitting Lastre-Parrada's testimony about his conversation with Pelaes. After that hearing, the district court concluded that the Sixth Amendment did not bar the use of the testimony because the government had not sought to have Lastre-Parrada solicit statements from Pelaes, nor had it sought to have the two placed in proximity to one another in order to gather any unsolicited statements Pelaes might make (*id.* at 6a).

The court of appeals affirmed the convictions, rejecting petitioner Pelaes's Sixth Amendment claim (Pet. App. 6a-14a). Although the court of appeals observed that the Bureau of Prisons had erred in placing Lastre-Parrada in proximity to Pelaes in the MCC, it found "no error in the district court's ruling that the government did not intentionally create a situation likely to induce Pelaes to make incriminating statements without the assistance of counsel" (*id.* at 8a-9a).

2. Relying on *United States* v. *Henry*, 447 U.S. 264 (1980), petitioners contend (85-7120 Pet. 6-10; 86-59 Pet. 3-4) that the admission of Pelaes's statement to Lastre-Parrada violated their Sixth Amendment rights to the assistance of counsel. As an initial matter, even if Pelaes's Sixth Amendment rights had been violated, the use of Pelaes's statement would not have violated any Sixth Amendment rights of Osorno. The right to counsel is personal to each accused, and Osorno does not complain that any of his own statements were erroneously admitted at trial. In any event, however, there is no need to distinguish between the two petitioners, since it is clear that there was no Sixth Amendment violation even as to Pelaes.

As both lower courts recognized, this case is readily distinguishable from *Henry*. In *Henry*, the defendant's cellmate was already acting as a paid informant; he was known

by the FBI to have access to the defendant and to be able to engage him in conversations without arousing suspicion; he had been instructed by an FBI agent to be alert to any incriminating information he might hear; and he engaged in conversations and ingratiated himself with the defendant. 447 U.S. at 270-271, 274-275 & n.13. Furthermore, the court of appeals in *Henry* found that the informant had "deliberately used his position to secure incriminating information" (*id.* at 270). In these circumstances, the Court found that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel," the government had "deliberately elicited" the statements from him within the meaning of *Massiah* v. *United States*, 377 U.S. 201, 206 (1964), and thereby violated Henry's Sixth Amendment right to counsel. 447 U.S. at 274. See also *Maine* v. *Moulton*, No. 84-786 (Dec. 10, 1985), slip op. 13-14; *Kuhlmann* v. *Wilson*, No. 84-1479 (June 26, 1986), slip op. 21.

Most recently, in another case involving a jailhouse informant, the Court stressed that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann* v. *Wilson*, slip op. 22. See also *Maine* v. *Moulton*, slip op. 16 ("knowing exploitation by the State of an opportunity to confront the accused without counsel being present"); *id.* at 17 n.13, quoting *United States* v. *Henry*, 447 U.S. at 277 (Powell, J., concurring) (" 'functional equivalent of interrogation' "). Accordingly, in order to establish a Sixth Amendment violation, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann* v. *Wilson*, slip op. 22.

In this case, there was no action by the government that "was designed deliberately to elicit incriminating remarks." *Kuhlmann* v. *Wilson*, slip op. 22. To the contrary, according to the factual findings sustained by the court of appeals, the government had not yet concluded any cooperation agreement with Lastre-Parrada at the time Pelaes and others approached him about testifying falsely. The AUSA did not know that Lastre-Parrada had been housed in proximity to Pelaes and indeed had done "all that reasonably could have been expected to avoid the creation of such a situation" (Pet. App. 9a). As a result, unlike in *Massiah*, *Henry*, and *Maine* v. *Moulton*, the government had given Lastre-Parrada no instructions to gather incriminating information from Pelaes while they were housed together (Pet. App. 7a-8a).[5] Moreover, aside from the absence of deliberate conduct by the government, there is no indication that Lastre-Parrada "deliberately used his position" to secure incriminating information from Pelaes (*United States* v. *Henry*, 447 U.S. at 270). It was Pelaes and his two companions who approached Lastre-Parrada about testifying falsely.

It is also significant that Pelaes's statement was an attempt to have Lastre-Parrada commit the crime of perjury. A person has no right to the assistance of counsel in the commission or planning of a crime, and the Sixth Amendment therefore did not require the exclusion of Pelaes's statement for this additional reason. *United States* v. *Darwin*, 757 F.2d 1193, 1198-1200 (11th Cir. 1985), cert. denied,

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[5]To be sure, the Bureau of Prisons erred in failing to heed the AUSA's instructions not to house Lastre-Parrada with Pelaes. But there is no suggestion that this error was deliberate, much less that it was attributable to any design to procure incriminating statements from Pelaes. Such negligence in the internal operations of a prison or similar institution, while regrettable, violates no personal rights of the accused, who has no constitutional right to be segregated from particular inmates. Cf. *Kuhlmann* v. *Wilson*, slip op. 23 n.24.

No. 85-5360 (Jan. 27, 1986); *United States* v. *Moschiano*, 695 F.2d 236, 242 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983); *Grieco* v. *Meachum*, 533 F.2d 713, 718 & n.4 (1st Cir.), cert. denied, 429 U.S. 858 (1976); *United States* v. *Merritts*, 527 F.2d 713, 716 (7th Cir. 1975). Even if Pelaes's attorney had been present and the statements had been made to the attorney himself, they would not have been privileged from use at trial. *Clark* v. *United States*, 289 U.S. 1, 15 (1933).[6]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[6]Petitioner Osorno also asserts in passing (86-59 Pet. 4) that the evidence against him was insufficient and that the disparity in the evidence against him and Pelaes was so great that he should have been granted a severance. The court of appeals, however, thoroughly examined the evidence against Osorno and found it amply sufficient, noting that the jury could have inferred that Osorno "assumed a major role" in the conspiracy (Pet. App. 13a-14a). The court's findings as to the strength of the case against Osorno are sufficient to rebut Osorno's claim that he should have been granted a severance.